

IN THE SUPREME COURT OF THE STATE OF NEVADA

BECKI D. LAURIE AND VINCENT J.
LAURIE, JR., INDIVIDUALLY, AND AS
NATURAL PARENTS AND
GUARDIANS AD LITEM OF MIA
ISABELLA LAURIE, A MINOR, AND
MADELYN NICOLE LAURIE, A
MINOR,
Appellants,
vs.
ROBERT MATTHEWS,
Respondent.

No. 46120

FILED

SEP 10 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY A. Alvarado
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order dismissing a personal injury action. Eighth Judicial District Court, Clark County; Jackie Glass, Judge.

Appellants filed a district court complaint on April 14, 2004, one day before the two-year statute of limitations on their personal injury claims was set to expire.¹ Appellants were represented by counsel located in their home state of Louisiana, who associated with Nevada counsel.

According to Nevada counsel, he was instructed by the Louisiana counsel to postpone service of process for approximately ninety days, as settlement negotiations with respondent's insurer were progressing satisfactorily at that point. Ultimately, however, the parties did not settle.

¹See NRS 11.190(4)(e).

Because respondent had relocated, appellants alleged, their licensed process server was unable to effect personal service on him. Appellants alleged that they sent by certified mail a copy of the summons and complaint to the respondent on or about August 8, 2004, but the documents were returned unclaimed. Therefore, under NRS 14.070, appellants attempted substituted service by mailing the documents to the director of the Nevada Department of Motor Vehicles ("DMV") on August 14, 2004. The DMV acknowledged receipt of the documents on August 27, 2006. Appellants then attempted substituted service on the DMV director a second time, in March 2005.

After appellants served respondent's insurer with a notice of intention to enter default against respondent, who had not responded to the litigation, respondent filed an NRCP 12(b)(4) motion to dismiss for improper service. Appellants opposed the dismissal motion, and they filed a motion to enlarge the time to properly serve respondent, if the district court found that service had been improper. Respondent opposed the motion for an enlargement of time.

At the hearing on both motions, the district court noted that the complaint was filed in April 2004, and the motion for an enlargement of time was not made until September 2005. The court then denied appellants' motion for enlargement of time and dismissed their case. Appellants have appealed.

On appeal, appellants argue that the district court abused its discretion in, among other things, denying their motion for an enlargement of time to serve respondent and dismissing the case below. We disagree.

Substitute service under NRS 14.070

If, after exercising due diligence in locating a defendant (who was operating a motor vehicle during an accident), the defendant cannot be found within the state, NRS 14.070 allows a plaintiff to serve the defendant by sending a copy of the complaint and summons to the DMV director.² The statute deems service to be sufficient when the plaintiff provides a return receipt signed by the defendant or a U.S. Postal Service return stating that the defendant refused to accept delivery or could not be located, or that the address was insufficient. The plaintiff's affidavit of compliance must be attached to the original process and filed in the action in which it was issued.

In this case, the parties dispute whether due diligence was exercised in locating respondent and if so, whether the requirements of NRS 14.070 were followed in substituting service on the DMV. Regardless, as appellants admitted below, service on the DMV was untimely.

NRCP 4(i)

NRCP 4(i) required appellants to serve the summons and complaint upon respondent within 120 days after filing the complaint. If service is not effectuated within the 120-day period, then NRCP 4(i) requires dismissal without prejudice, unless a motion to enlarge the time

²See Browning v. Dixon, 114 Nev. 213, 218, 954 P.2d 741, 744 (1998) (concluding, as a matter of law, that the plaintiff did not exercise due diligence in attempting to personally serve the defendant before resorting to substituted service under NRS 14.070, when the plaintiff mailed letters to the defendant, using an incomplete address without an apartment number, and made no apparent attempt to locate the defendant through his employer or insurer, both of which were known to the plaintiff).

for service is filed and good cause is shown. In determining good cause for an extension of time, NRCP 4(i) requires the district court to take into consideration a party's failure to file a motion to enlarge time before the 120-day period expires. "The determination of good cause is within the district court's discretion,"³ and we review the district court's decision for an abuse of discretion.⁴

In Scrimmer v. District Court, we noted a number of considerations, none of which are controlling, that may govern a district court's analysis of good cause under NRCP 4(i).⁵ In light of those factors, we conclude that, in this case, the district court did not abuse its discretion in dismissing the underlying case. All parties agree that there is no evidence that respondent deliberately evaded service of process. Further, respondent points out that his new address was available if appellants had provided their process server with his date of birth or driver's license number, which were included in the police report of the accident. He also notes that appellants failed to request his address from his insurance carrier, with whom the Louisiana counsel was conducting negotiations.

³Scrimmer v. Dist. Ct., 116 Nev. 507, 513, 998 P.2d 1190, 1193-94 (2000).

⁴Abreu v. Gilmer, 115 Nev. 308, 985 P.2d 746 (1999).

⁵Id. at 516, 998 P.2d at 1195-96 (listing as examples the types of considerations a district court may look at when determining whether good cause to extend the service deadline was shown, including the parties' diligence and difficulties with respect to effectuating service, the statute of limitations, attempts to settle, lapse of time between the deadline and service, and prejudice).

Despite attempts to settle the case during the first ninety days after the complaint was filed, appellants still had thirty days to effect service, and they did not request, nor did the insurer offer, to extend the service period. Moreover, appellants failed to move the district court for an enlargement of time for service until over one year after the 120-day service period expired. Although appellants claim that they did not seek an enlargement of time because they believed that substituted service had been properly made upon the DMV director, appellants also admit that the first service upon the DMV was made after the 120-day period.⁶

Although the statute of limitations has already run, appellants took this risk by waiting to file their complaint and to attempt service. Moreover, as respondent denied having been informed of the complaint until one year after the end of the service period, and as more than five years has passed since the accident occurred, respondent claims

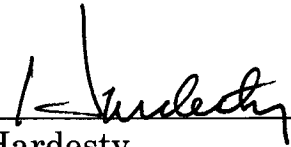
⁶We reject appellants' attempt to justify their late service by reference to the lapses found acceptable by this court due to other circumstances present in distinguishable cases. See e.g., Scrimmer, 116 Nev. at 517-18, 998 P.2d 1190, 1196-97 (holding that service of process 13 and 16 days late were excused because they were completed before the district court's extended deadlines for service and there was little or no prejudice to the defendant); Domino v. Gaughan, 103 Nev. 582, 747 P.2d 236 (1987) (concluding that service effected nine days late was excused by the late request to an inexperienced and ill Nevada counsel); Abreu v. Gilmer, 115 Nev. 308, 313-14, 985 P.2d 746, 749-50 (1999) (holding that a 26-day delay in personal service was excused, because service by publication had been completed within the 120-day period).

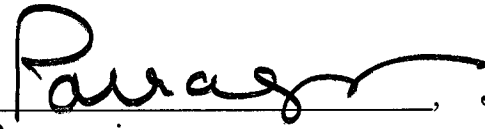
In addition, appellants failed to provide evidence from the United States Postal Service that respondent refused to accept delivery or could not be located, as required under NRS 14.070.

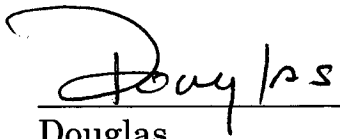
to have suffered the very prejudice and harm that the service period was meant to foreclose—memories have faded and evidence has deteriorated.

We conclude, therefore, that the district court did not abuse its discretion in determining that appellants failed to show good cause for enlarging the time for service upon respondent and dismissing the underlying case. Accordingly, we affirm the district court's order granting respondent's motion to dismiss.

It is so ORDERED.


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

cc: Hon. Jackie Glass, District Judge
Howard Roitman, Settlement Judge
Marc D. Risman
Wilson, Elser, Moskowitz, Edelman & Dicker, LLP
Eighth District Court Clerk